vested [37] in the German government,[38] there could be no basis for granting the immunity. And this was done, it should be observed, not only over the urgent pleadings in court of the German government, but also despite its strongest diplomatic representations.[39] The German government clearly considered that its interest was seriously affected (which alone might warrant the extension of immunity), and there can be little doubt that in fact it was, not only by losing to England the ship and cargo, but also by the closing of our ports to future prizes and by the political results of the decision.[40] Accordingly, although the decision is in the court's discretion, it would seem that immunity should have been extended to the *Appam*.

IS DECEPTION A NECESSARY INGREDIENT OF UNFAIR COMPETITION? — The law of unfair competition as distinguished from the law of technical trade-mark is of comparatively modern origin.[1] The fundamental notion underlying this branch of the law has been tersely stated by Lord Halsbury to be that nobody has any right to represent his goods

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[37] Upon the question of whether title to a belligerent prize passes upon capture or upon the subsequent decree of the prize court, there have been much confusion and dispute. See 5 CALVO, *supra*, §§ 3009, 3011 *et seq.*; TAYLOR, INTERNATIONAL PUBLIC LAW, § 554; Moxon *v.* The Fanny, *supra*. WHEATON, 581, says that in the period between the capture and the prize court's condemnation the legal title is in abeyance, or at least "is legally sequestered." James Brown Scott, "The Right of Prize and Neutral Attitude toward the Admission of Prizes," *supra*, 105, argues that a distinction is to be made between the capture of a belligerent prize (in which case title passes at once) and the capture of a neutral prize (in which case the condemnation of a prize court is needed to pass title), "because if force be a measure of title between belligerents, law determines the relations of belligerent and neutral." In 2 OPPENHEIM, 238 *et seq.*, however, the opinion is expressed that a necessity for condemnation even in the case of a belligerent prize follows from the necessity that exists in the case of a neutral prize. HALL, 613, 614, states that the captor's title is complete at once as between him and the enemy, but that as between him and a neutral, the judgment of a prize court is required. Accordingly the court in the principal case takes a dubious position when it holds that title to the *Appam*, a belligerent prize, did not pass on capture.

[38] A German prize court might have condemned the *Appam*, and even sold her, prior to or pending the exercise of jurisdiction by the United States court. The Arabella and the Madeira, 2 Gall. (U. S. C. C.) 367, Fed. Cas. No. 569. See HALL, 614; WHEATON, 604; 2 WESTLAKE, 230. WESTLAKE (vol. ii, p. 244) says that this power, though unsound in theory, is in practice perfectly well established. In the principal case it is admitted (p. 403) that a German court might have thus acted, but restitution is nevertheless decreed. When it is remembered that the decree of a prize court is recognized by all the world as conclusive of title, the difficulties of the court's position are obvious.

[39] The German Ambassador to the Secretary of State, February 22, 1916, DEPARTMENT OF STATE, *supra*, 334; Memorandum from the Imperial Government, DEPARTMENT OF STATE, *supra*, 339.

[40] See the references in note 10, *supra*. *Cf.* William C. Bullitt, "Worse or Better Germany," 8 NEW REPUBLIC 321 (October 28, 1916). A careful examination of these authorities will show that, considered from the point of view outlined above, The Appam presents a new and important (though subsidiary) question: how far is the interest of the party in control of the foreign government to be considered as that of the foreign sovereign? In the principal case that interest happens to be identical with the United States' interest. See Herbert B. Swope's articles on Germany, in the NEW YORK WORLD, beginning November 4, 1916.

[1] See HOPKINS, TRADE-MARKS, 2 ed., § 18; ROGERS, GOOD-WILL, TRADE-MARKS AND UNFAIR TRADING, 271–74.

as the goods of somebody else,[2] and this principle has uniformly been the basis of the vast number of decided cases. Of late, however, a sporadic tendency has manifested itself to extend the scope of the doctrine to cases in which the "offending" trader has practiced no deception.[3] It is with the most recent of these decisions that we are at present concerned.

In *Meccano, Ltd.* v. *Wagner*[3] the plaintiff at considerable expense placed upon the market an ingenious toy consisting of strips of metal of various shapes and sizes, with which it was possible to build in miniature some of the more common mechanical contrivances. The toy was sold in "outfits," seven in all, each "outfit" fitting in with the previous ones purchased and enlarging the possibilities of the toy. The defendant began its manufacture, purposely made his "outfits" of such dimensions as to render them susceptible of use along with the originator's product, and sold at a lower price, resulting in a considerable falling off in the plaintiff's business. In restraining the defendant from making further sales, the court, as in *Prest-O-Lite Co.* v. *Davis*,[3] proceeded upon the ground that the plaintiff had established a "business system" and the defendant's interference with the same constituted unfair competition. The question of deception was thus made an irrelevant inquiry.

"Business system" in this connection seems on close scrutiny to come to nothing more than this, that the plaintiff by an ingenious method has rendered the probability of future demand for a given article very great. The sale of "outfit" No. 1 is calculated to generate a desire for succeeding "outfits." The plaintiff has sown the seed of demand. Advertising accomplishes the same result, and yet it has never been supposed that the advertiser who creates a popular demand for a new commodity not the subject of patent is entitled to be saved from competition.[4] All that he can insist on is that his competitors sell their product as of their own manufacture.

It is well settled that the manufacturer of an unpatented machine is

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[2] Reddaway *v.* Banham, [1896] A. C. 199, 204.

[3] Meccano, Ltd. *v.* Wagner, 234 Fed. 912. By the same court, Prest-O-Lite Co. *v.* Davis, 209 Fed. 917, affirmed in 215 Fed. 349. The facts of the latter case in substance were presented in five other suits. In Searchlight Gas Co. *v.* Prest-O-Lite Co., 215 Fed. 692, in affirming a judgment for the appellee the court reasoned vaguely about a property right of "service" which the appellee had acquired and with which the appellant had interfered, but relied wholly on the ground of deception, taking the view that the appellant could go on provided he distinguished his product from appellee's. In Prest-O-Lite Co. *v.* Bogen, 209 Fed. 915; Prest-O-Lite Co. *v.* Avery Lighting Co., 161 Fed. 648; Prest-O-Lite Co. *v.* Post & Lester Co., 163 Fed. 63, the courts found for the plaintiff on the ground that the defendant was deceiving purchasers, but intimated that the defendant could continue if he distinguished his product. In Prest-O-Lite Co. *v.* Auto Acetylene Light Co., 191 Fed. 90, the court negatived any passing off, and, though urged, declined to extend the law of unfair competition to a case in which there was no deception.

[4] ". . . the instrument sold is made as it is, partly, at least, because of a supposed or established desire of the public for instruments in that form. The defendant has the right to get the benefit of that desire even if created by the plaintiff. The only thing it has not the right to steal is the good will attaching to the plaintiff's personality, the benefit of the public's desire to have goods made by the plaintiff." Holmes, C. J., in Flagg Mfg. Co. *v.* Holway, 178 Mass. 83, 91, 59 N. E. 667. See also Keystone Type Foundry *v.* Portland Pub. Co., 186 Fed. 690.

not entitled to a monopoly in the business of supplying repair parts,[5] although in these cases the manufacturer may be said to have established a "business system" within the meaning of the court. In *Globe-Wernicke* v. *Fred Macey Co.*[6] the court declined to restrain the defendant from making sections which fitted a sectional bookcase exploited by the plaintiff. The Meccano case and its predecessor, *Prest-O-Lite* v. *Davis*,[3] thus represent a distinct innovation in the law of unfair competition.[7] This court would infuse a new morality into business activities, a more exacting ethical standard, which, we believe, cannot survive in the face of other and weightier considerations with which it necessarily comes in conflict.

Free competition is a part of the creed of every enlightened community. There is but one exception to this, namely, patent and copyright legislation, necessary concessions to the promotion of invention and literary achievement. But unless a commodity is a subject for these exceptional protective laws, the bars are down and competition is not only permissible but highly desirable. The principal case runs violently counter to these notions. It holds in store grave dangers for the consuming public, calculated as it is to create monopolies in articles not the subject of patent; and furthermore monopolies that are perpetual, a privilege not accorded by the patent laws to the greatest of inventions. Should the time arrive when it seems politic to curtail competition in other than patentable products, the very vastness of the step would seem to recommend it as a matter to be dealt with by the legislature rather than by the courts. Meanwhile the prohibition of the law of unfair competition is better confined to cases in which the "offending" trader has resorted to some sort of deception.

THE FEDERAL TRADE COMMISSION AS SPECIAL MASTER IN ANTI-TRUST SUITS. — Section seven of the Federal Trade Commission Act [1] permits a federal court which has determined upon the dissolution of a combination violating the Sherman Act [2] to refer to the Commission the drawing of the decree directing the scheme of dissolution. This

[5] Bender *v.* Enterprise Mfg. Co., 156 Fed. 641; Deering Harvester Co. *v.* Whitman & Barnes Mfg. Co., 91 Fed. 376; Magee Furnace Co. *v.* Le Barron, 127 Mass. 115; Neostyle Mfg. Co. *v.* Ellam's Duplicator Co., 21 Reports of Patent, Design and Trade-Mark Cases, 185.

[6] 119 Fed. 696.

[7] These decisions can find no support in such cases as Board of Trade *v.* Christie Grain & Stock Co., 198 U. S. 236, in which the defendant induced a breach of trust; or Sperry & Hutchinson Co. *v.* Weber & Co., 161 Fed. 219, and Butterman *v.* Louisville & Nashville R. Co., 207 U. S. 205, where the defendant was bringing about breaches of contract. In Fonotopia, Ltd. *v.* Bradley, 171 Fed. 951, the defendant was restrained from reproducing phonograph records from a record obtained from the plaintiff. This element of using another's product in the production of one's own is not to be found in Prest-O-Lite *v.* Davis, *supra*, and though perhaps present in Meccano, Ltd. *v.* Wagner, *supra*, was not the ground relied on, the decision going squarely on the basis of interference with a selling system. Moreover, Fonotopia, Ltd. *v.* Bradley seems to be nothing more than the reproduction of an unpatented and uncopyrighted article — most imitations profit by the labor and money expended in perfecting the original product. *Cf.* Keystone Type Foundry *v.* Portland Pub. Co., 186 Fed. 690.

[1] 38 STAT. AT LARGE, § 7, 722.

[2] 26 STAT. AT LARGE, 209.